

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Suzette Guzman-Moore
(OI File No. H-14-4-3091-9),

Petitioner,

v.

The Inspector General,
U.S. Department of Health and Human Services.

Docket No. C-15-3942

Decision No. CR4565

Date: March 31, 2016

DECISION

The request for hearing of Petitioner, Suzette Guzman-Moore, is dismissed pursuant to 42 C.F.R. § 1005.2(e)(1),* because it was untimely filed.

I. Background

The Inspector General for the Department of Health and Human Services (I.G.) notified Petitioner by letter dated April 30, 2015, that she was being excluded from participation in Medicare, Medicaid, and all federal health care programs, effective May 20, 2015, for a minimum period of ten years. The I.G. cited section 1128(a)(3) of the Social Security Act (the Act) (42 U.S.C. § 1320a-7(a)(3)) as the basis for Petitioner's exclusion. The I.G. cited the fact that Petitioner was convicted in the Albany County Court, State of New York, of a felony criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. I.G. Exhibit (Ex.) 1.

* References are to the 2014 revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the agency action, unless otherwise stated.

Petitioner filed a request for hearing dated August 1, 2015, which was postmarked August 19, 2015. The case was assigned to me for hearing and decision on October 8, 2015. A prehearing conference was convened on October 21, 2015. The substance of the prehearing conference is memorialized in my Prehearing Conference Order and Schedule for Filing Briefs and Documentary Evidence dated October 21, 2015 (Prehearing Order). During the prehearing conference, the I.G. requested to file a motion to dismiss prior to case development. I set a briefing schedule for a motion to dismiss by the I.G. Prehearing Order ¶ 5.

The I.G. timely filed a motion to dismiss and supporting brief on November 20, 2015 with I.G. Ex. 1. Petitioner's response to the I.G. motion was due not later than January 12, 2016. On January 21, 2016, I ordered Petitioner to show good cause why her case should not be dismissed for abandonment because she failed to respond to the I.G. motion to dismiss. Petitioner was ordered to show cause not later than February 22, 2016. No response to the order to show cause was received from Petitioner and on March 2, 2016, I dismissed this case for abandonment. On March 7, 2016, my office received Petitioner's combined response to the order to show cause and the I.G.'s motion to dismiss (P. Response). Petitioner's response is dated February 1, 2016 and postmarked February 18, 2016. Petitioner represents in her filing that she filed a response to the I.G. motion to dismiss by mail on or about January 2, 2016. My office has no record of receiving a document from Petitioner dated on or about January 2, 2016. However, I accepted Petitioner's representation and, on March 14, 2016, I sua sponte vacated the order dated March 2, 2016 that dismissed this case. Petitioner did not object to I.G. Ex. 1 and it is admitted as evidence.

II. Discussion

A. Applicable Law

Section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)) establishes Petitioner's rights to a hearing by an administrative law judge (ALJ) and judicial review of the final action of the Secretary of the United States Department of Health and Human Services (Secretary). The Secretary has provided by regulation that an excluded individual has the right to request a hearing before an ALJ. 42 C.F.R. §§ 1001.2007(a)(1), 1005.2(a). The regulations require that a request for hearing be in writing and be filed not more than 60 days from the date of receipt of the notice of exclusion. 42 C.F.R. §§ 1001.2007(b), 1005.2(c). The notice of exclusion is presumed to be received five days after the date on the notice, unless there is a reasonable showing to the contrary. 42 C.F.R. § 1005.2(c). I am required to dismiss a request for hearing that is not filed timely. 42 C.F.R. § 1005.2(e)(1). The regulations grant me no discretion to waive a late filing or to extend the time for filing.

B. Issue

Whether Petitioner's request for hearing must be dismissed because it was not timely filed?

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was not timely filed.

2. Petitioner's request for hearing must be dismissed pursuant to 42 C.F.R. § 1005.2(e)(1).

There is no dispute that the I.G. mailed Petitioner a letter dated April 30, 2015, notifying Petitioner of her exclusion from Medicare, Medicaid, and all federal health care programs. I.G. Ex. 1. Pursuant to 42 C.F.R. § 1005.2(c), there is a rebuttable presumption that the April 30, 2015 notice was received by Petitioner on Tuesday, May 5, 2015. Pursuant to 42 C.F.R. §§ 1001.2007(b) and 1005.2(c), Petitioner had 60 days to file her request for hearing. The sixtieth day after Petitioner's presumed receipt of the notice of exclusion fell on Saturday, July 4, 2015. Therefore, Petitioner had until July 6, 2015 to file her request for hearing. 42 C.F.R. § 1005.12(a).

There is no dispute that Petitioner filed her request for hearing by regular mail and that the envelope bearing the request for hearing was postmarked August 19, 2015, which pursuant to 42 C.F.R. § 1005.11(a)(f), is treated as the date of filing. Petitioner's request for hearing had to be filed not later than July 6, 2015, but she did not file the request for hearing until August 19, 2015, which was 44 days late. Because Petitioner's request for hearing was 44 days late, the I.G. has moved that this case be dismissed.

The regulations grant me no discretion to extend the time for filing a request for hearing or to excuse the late filing of a request for hearing. I am required to dismiss a hearing request that is not timely filed. 42 C.F.R. § 1005.2(e)(1). Petitioner's only possible defense to the motion to dismiss is a showing that she received the April 30, 2015 notice of exclusion not more than 60 days prior to August 19, 2015. Petitioner would need to show that she received the notice of exclusion on or after June 20, 2015. Petitioner has failed to make the required showing. Accordingly, I have no discretion but must dismiss Petitioner's request for hearing.

Petitioner does not deny in her request for hearing that there is a basis for her exclusion. Petitioner requests a reduction in the ten-year period of exclusion imposed by the I.G. Petitioner makes no allegations about when she received the April 30, 2015 notice of exclusion or why she did not request a hearing until August 2015. In her response to the I.G. motion to dismiss, Petitioner asks that I not dismiss her request for hearing. She argues that in the prison system the outgoing mail is delayed or never reaches its intended destination; that she submitted her hearing request timely; and that any delay was the result of being incarcerated. Petitioner's allegations are not specific and are insufficient. Petitioner does not allege when she received the April 30, 2015 notice of exclusion or the date she gave her request for hearing to prison officials for mailing. Petitioner's request for hearing was dated August 1, 2015 and was postmarked August 19, 2015 – an 18-day delay, assuming she gave the request for hearing to prison officials on August 1, 2015. Petitioner's response is dated February 1, 2016; on the back of the envelope is a stamp that suggests some action by a prison official on February 15, 2016; and the postmark is February 18, 2016 – a 17-day delay assuming Petitioner gave the response to prison officials on February 1, 2016. If I infer from the evidence before me that Petitioner's incarceration causes an 18-day delay in outgoing mail and apply that same inference to incoming mail, Petitioner should have received the April 30, 2015 notice of exclusion on or about May 18, 2015 – 18 days from the date of the letter. However, relying upon the inference that Petitioner received the notice of exclusion on May 18, 2015 does not help Petitioner as her request for hearing would have had to be filed not later than July 17, 2015, more than 15 days before the August 1, 2015 date on her request for hearing. Therefore, even if I apply the inference that Petitioner did not receive the notice of exclusion until May 18, 2015; assume that she delivered the request for hearing to prison officials on August 1, 2015, the date on the request for hearing; and treat the delivery to prison officials as the date of filing, I must conclude that Petitioner's request for hearing was 15 days late.

Accordingly, I conclude Petitioner did not timely file a request for hearing and dismissal is required by 42 C.F.R. § 1005.2(e)(1).

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge